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November 19, 2010

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

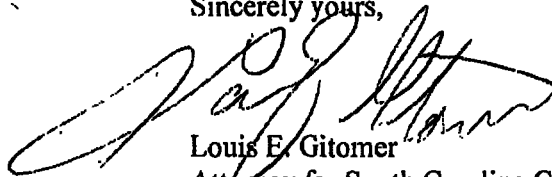
RE: Docket No. 42123, *M & G Polymers USA, LLC v. CSX Transportation, Inc. and
South Carolina Central Railroad Company*

Dear Ms. Brown:

Enclosed for efilng is a Motion to Bifurcate of the South Carolina Central Railroad
Company.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer
Attorney for South Carolina Central
Railroad Company

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. 42123

**M & G POLYMERS USA, LLC
v.
CSX TRANSPORTATION, INC. AND SOUTH CAROLINA CENTRAL RAILROAD
COMPANY**

**SOUTH CAROLINA CENTRAL RAILROAD COMPANY'S
MOTION TO BIFURCATE**

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**Attorneys for: SOUTH CAROLINA CENTRAL
RAILROAD COMPANY**

Dated: November 19, 2010

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42123

M & G POLYMERS USA, LLC
v.
CSX TRANSPORTATION, INC. AND SOUTH CAROLINA CENTRAL RAILROAD
COMPANY

SOUTH CAROLINA CENTRAL RAILROAD COMPANY'S
MOTION TO BIFURCATE

Pursuant to 49 C.F.R. §1117.1 and other applicable law and authority, Defendant South Carolina Central Railroad Company ("SCRF") respectfully submits this Motion to Bifurcate the market dominance inquiry from the stand alone cost inquiry for traffic identified in M & G Polymers USA, LLC's ("M&G") Exhibit B to the Second Amended Complaint as item 12, from Apple Grove, WV to Darlington, SC (the "SCRF Route").

The Board should bifurcate this proceeding and determine the threshold jurisdictional issue of market dominance prior to a stand alone cost analysis ("SAC") for three reasons. First, SCRF does not possess market dominance over the SCRF Route because there is actual and potential intermodal competition. Second, by completing consideration of market dominance first in these proceedings, all the parties and the Board would be spared significant amounts of unnecessary expense and effort. Third, this case is unique because it involves a Class III rail

carrier and a Class I rail carrier with a joint rate over one of sixty-eight lines in question with a minimal amount of issue traffic.¹

The Board only has jurisdiction to determine the reasonableness of a transportation rate if there is “an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. §10707(a). The Board applies this jurisdictional limitation by determining “whether there are any feasible transportation alternatives that could be used for the issue traffic. The Board considers both intramodal competition (from other railroads) and intermodal competition (from other modes of transportation such as trucks, transload arrangements, barges or pipelines).” *E.I. du Pont De Nemours and Company v. CSX Transportation, Inc.*, STB Docket No. 42100 (STB served June 30, 2008).

M&G as the complainant has the burden of proving market dominance. Without having had discovery on M&G regarding market dominance, SCRF maintains, based on the following information that it has provided to M&G in discovery,² that there is effective competition for the SCRF Route.

Graham Packaging Company, Inc. (“Graham”) is the receiver of polyethylene terephthalate (“PET”) from M&G via SCRF. Graham is located at 741 Wellman Road, Darlington, SC 29532. Graham not only receives shipments of PET from SCRF, but it also receives shipments of PET by truck. SCRF has seen trucks unloading PET at the Darlington

¹ In 2010 only 44 cars of issue traffic have moved over the SCFR Route. No issue traffic had moved over the SCRF Route for the previous 3 years. See Exhibit 1.

² In the spirit of cooperation, SCRF has answered M&G’s discovery requests with regard to market dominance issues pending the Board’s decision on SCRF’s Motion for Protective Order filed concurrently with this motion, and even though the Board has not yet acted on M&G’s pending motion seeking Board approval to file the Second Amended Complaint.

location where SCRF delivers PET. Attached as Exhibit 2 is a representative picture of a truck being unloaded at this facility in Darlington on November 10, 2010.

In a recent conversation between Mr. Roy Budgell, Director of Sales for SCRF and the Graham plant manager, Julian Stewart, Mr. Stewart indicated that in excess of 80% of Graham's PET volume moves into them by rail with the balance coming to them by truck. The commodity delivered inbound by truck and rail is pelletized plastic. Mr. Stewart also informed Mr. Budgell that Graham would shortly cease using PET from M&G because it did not meet Graham's specifications and that Graham would either truck in the alternate supply or use a different rail route from its supplier.

SCRF recognizes that traditionally, the Board has chosen not to bifurcate the market dominance and rate reasonableness phases in the rail area because the agency usually finds market dominance over the movement at issue. However, the Board has been flexible in applying this practice and has bifurcated the market dominance and rate reasonableness inquiries where the evidence submitted by the defendant rail carrier raised "considerable doubts as to the complainants' ability to demonstrate market dominance."³

Graham is currently receiving PET in pelletized plastic form by truck and its manager has indicated that it was open to receiving more of its PET shipments by truck. The Board has previously held that the potential for effective truck competition is sufficient to keep the carrier's rates in check. *See FMC Wyoming Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 713 (2000).

³ *Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company*, STB Docket No. 42012 slip op. at 5 (STB served Jan. 26, 1998). See also *Government of the Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd., and Matson Navigation Company, Inc.*, STB Docket No. WCC-101 (STB served Feb. 2, 2007) slip op. at 6.

Additionally, there may be rail competition because Graham is considering using a different rail route from an alternative supplier to meet its PET shipping needs. SCRF is not addressing the issue of truck competition for all of the movements being challenged by M&G in the instant complaint. SCRF is only addressing the movement of PET to the Graham facility that it serves in Darlington, SC. SCRF does not have sufficient information to posit whether there is market dominance at the other 67 destinations involved in the complaint.

In many prior rate reasonableness cases, specifically those involving large shipments of coal from mines to utilities, there has not been a serious question regarding market dominance because the complainants in those cases did not have competitive transportation options. Those cases are clearly distinguishable from the case currently before the Board. Those cases have involved one line of traffic, with a single commodity, single destination and multiple origins in close proximity.⁴ This is a non-coal case that has multiple lanes of traffic with multiple origins and multiple destinations and that requires a Class III railroad to defend a single lane as part of a much larger SAC proceeding. Bifurcating this proceeding could save the parties and the Board significant amounts of unnecessary expense and effort. The construction of a Stand Alone Railroad designed to handle movements over 68 traffic lanes, including the SCRF Route over a shortline railroad would require a complex SAC presentation.

The Board noted in *Simplified Standards for Rail Rate Cases*, STB Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), that it expected a full-SAC case to cost \$5 million. Slip

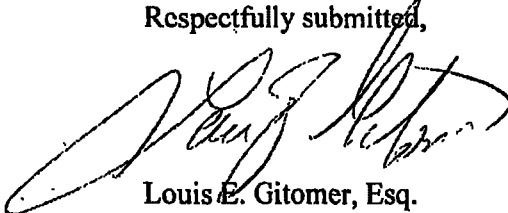
⁴ E.g. *AEP Texas North Company v. BNSF Railway Company*, STB Docket No. 41191 (Sub-No. 1); *Western Fuels Association, Inc., and Basin Electric Power Cooperative v. BNSF Railway Company*, STB Docket No. 42088; *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057; and *Duke Entergy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069.

op at 32. Even if it were to only cost SCRF five percent of that amount to defend its single lane of traffic, it is a significant expense for a Class III railroad that could potentially be avoided by bifurcating this proceeding.

CONCLUSION

Requiring SCRF to go through a burdensome, expensive, and time consuming SAC proceeding only to reach the conclusion that there is no qualitative market dominance on the SCRF Route would be a waste of everyone's resources. SCRF requests that the Board bifurcate the market dominance inquiry from the stand alone cost inquiry for traffic on the SCRF Route and institute an expedited procedural schedule allowing for discovery, opening, reply, and rebuttal on the market dominance issue. SCRF also requests that if the Board grants M&G authority to move forward with its Second Amended Complaint, that the Board postpone setting a procedural schedule, including mediation, which would involve SCRF, until after the Board has made a determination on the market dominance inquiry.

Respectfully submitted,



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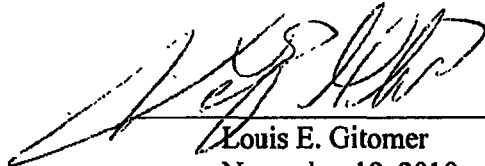
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Attorneys for: SOUTH CAROLINA CENTRAL
RAILROAD COMPANY

Dated: November 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for
M & G Polymers USA, LLC and CSX Transportation, Inc. electronically.

A handwritten signature in black ink, appearing to read 'Louis E. Gitomer', is written over a horizontal line.

Louis E. Gitomer
November 19, 2010

EXHIBIT 1-2010 SCRF DELIVERIES TO GRAHAM

User ID: RMTKSP

Report: Description Simple list of cars without revenue. Includes destination weight and route on detail line.

For Dates 1/01/09 'thru 11/04/10 (Interchg)

Reverse Sort & Select/Omic Options

	Sum	Sum
Sort 1: Y The Cust Code		
3: N Commodity (STCC-7)		
2: Y Traffic_Type		
4:		

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SS/O: S Type: L Report Field: Dest: Sun City/ST
Value 1: DARLINGTON SC
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s/o: s type: L Report field: Origin stn City/s:
valuc 1: APPLE GROVE WV 2:
3: 4: 5: 6:

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INLC	Number	WB #	WB	Date	Net Weight	Destination	St	Roads in Route
THE CUSTOMER CODE: GRAPAC DAR GRAHAM PACKAGING								

[illegible]

THE CUSTOMER CODE: POLOVE FLO POLYQUEST-STORAGE YARD

UTCX	47544	822700	3/29/10	191400	DARLINGTON	SC	CSXT	SCRF
Total	Interline Received					Net Weight	131.400	# of Cars
TOTAL:	POLOUE FLO POLYQUEST-STORAGE YARD					Net Weight	131.400	# of Cars
						Grand Total:	8,537.900	# of Cars

11/04/10 SCRF Lane #8-12 Report
11:04:37 Report based on selections and sub-totals listed on page one

User ID: RMTKSP

Report Description Sample list of cars without revenue. Includes destination
weight and route on detail line.

For Dates 1/01/09 thru 11/04/10 (Interchg)

Init Number WB # WB Date Net Weight Destination

St Roads in Route

** END OF REPORT **

EXHIBIT 2-PICTURE OF TRUCK UNLOADING AT GRAHAM

